BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MONROE T. ANTHONY Claimant	)	
VS.	)	
UNITED PARCEL SERVICE, INC. Respondent	)	Docket No. 1,037,950
AND	)	
LIBERTY INSURANCE CORP. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the March 14, 2008, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh. Keith L. Mark, of Mission, Kansas, appeared for claimant. Robert J. Wonnell, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that at the time of his injury, claimant was on an unpaid lunch break and that respondent "did not exhibit such control over the claimant's location that he could be considered at work or 'on the premises.'"[1] Accordingly, the ALJ found that claimant's injury did not arise out of and in the course of his employment and denied his request for temporary total disability compensation and medical benefits.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the March 12, 2008, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

[1] ALJ Order (Mar. 14, 2008) at 2.

ISSUES

Claimant requests review of the ALJ's finding that his injury did not arise out of and in the course of his employment. Claimant equates his job as a delivery driver to that of a traveling salesman, as travel is a large part of his job and he does not have a definite place of work. As such, he was on a trip that furthered the interests of his employer and any accident occurring any time during that trip should be considered compensable so long as he does not take a deviation so substantial that he would be deemed to have abandoned any business purpose. Further, claimant argues he was under the control of respondent at the time of his accident, since he was required to take a lunch break, was required to wear his uniform during his lunch break, was limited to taking his lunch within a one-half mile radius of his delivery route, and was required to secure his truck.

Respondent argues that claimant was injured during an unpaid lunch break while he was off the respondent's premises and, therefore, the coming and going rule supports a finding that his injuries are not compensable. Respondent also argues that application of the traveling salesperson exception does not result in a finding of compensability as claimant made a substantial deviation from his employment. Accordingly, respondent requests that the ALJ's Order be affirmed.

The issue for the Board's review is: Were claimant's injuries sustained as a result of an accident that arose out of and in the course of his employment with respondent?

FINDINGS OF FACT

Claimant worked for respondent as a package delivery driver. He said that other than 10 or 15 minutes each morning and evening, he spent his work day making deliveries and doing pick-ups in his truck. He is allowed a 10-minute paid break each day and is required to take a 30-minute unpaid lunch break. He can take his lunch break anytime between his third and sixth hour of working. When taking his lunch break, he is responsible for securing his vehicle and should be able to look and see the truck. He must stay within a one-half mile radius of his route. He also wears his brown uniform during his lunch break and so is representing respondent to the public. Claimant testified that drivers are required to take a lunch break and he had been reprimanded for not taking a lunch break.

On November 19, 2007, claimant stopped at a Wendy's restaurant that was on his regular route to get something to eat. He had worked close to nine and a half hours that day and had made his last delivery stop but had not taken the truck back to respondent's facility. He found a secure place to park his truck and then got out and walked toward the restaurant. When walking to the front door, he slipped and fell, injuring his left elbow, right hand, right pinky finger, left ankle, right side of his head, and left shoulder. Claimant reported his injury to his supervisor and was seen by the company doctor. The company doctor referred him to Dr. Daniel Stechschulte. Respondent provided claimant with light

duty work until November 29, when he was told that respondent would not provide him with light duty work because he would not be back to regular duty within 30 days. He has not been released to return to work.

Claimant's supervisor, Douglas Omillian, confirmed that claimant punched out for an unpaid lunch break at 6:35 p.m. and finished lunch at 7:05 p.m. He confirmed that drivers must take their lunch within a one-half mile radius of their route, and claimant was within a one-half mile radius of his route when he had his accident. Other than the requirement that they stay within a half mile of their route, drivers are free to take lunch wherever they like. They can bring their lunch and eat in the truck or can pick a restaurant, get a meal, and eat in the truck. They are also required to park their truck in a safe place, but Mr. Omillian was not aware of a requirement that the truck be within eyesight of the driver. Mr. Omillian said that drivers must take a lunch break, as it is part of the contractual agreement between respondent and the union. Mr. Omillian also said that drivers need a rest period so they can be refreshed. While a driver is on his lunch break, he cannot be forced to make an emergency pick-up or delivery. He acknowledged that drivers are still under the control of respondent during their lunch breaks. They must wear their uniform, and there is a code of conduct for the drivers while they are in uniform. There are even rules concerning how the uniform is to be worn. For example, drivers cannot roll their shirt sleeves up even while on lunch break.

Mr. Omillian said that according to the contract between respondent and the union, drivers are to take a lunch break sometime after their third hour of work but before their sixth hour of work. However, he has never heard of a driver being reprimanded for taking a lunch break after the sixth hour of work.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[2] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[3]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the

[2] K.S.A. 2007 Supp. 44-501(a).

[3] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

> rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[4]

K.S.A. 2007 Supp. 44-508(f) states in part:

> **The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence.** An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency. (Emphasis added.)

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 2007 Supp. 44-501(g) states:

> It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act to both. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.

In Larson's *Workers' Compensation Law*, the majority rule is that an identifiable deviation from a business trip for personal reasons takes the employee out of the course

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[4] *Id.* at 278.

of employment until the employee returns to the route of the business trip, unless the deviation is so small as to be disregarded as insubstantial. § 17.01 (2006). A common variation of this rule is the side trip, which occurs somewhere along the course of the main journey, when the main journey is intended as a business journey and a side trip is of a personal nature. Larson's, § 17.03[3] (2006), describes the majority rule as until the side-trip is completed, the deviation for personal reasons would cause a denial of benefits.

In *Sumner*,[5] the Kansas Supreme Court stated:

> In Kansas, the deviation must be so substantial that the employee is deemed to have abandoned any business purpose.
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> "A deviation from the employer's work generally consists of a personal or nonbusiness-related activity. The longer the deviation exists in time or the greater it varies from the normal business route or in purpose from the normal business objectives, the more likely that the deviation will be characterized as major. *In the case of a major deviation from the business purpose, most courts will bar compensation recovery on the theory that the deviation is so substantial that the employee must be deemed to have abandoned any business purpose* and consequently cannot recover for injuries received, even though he or she has ceased the deviation and is returning to the business route or purpose." (Emphasis added.) *Kindel*, 258 Kan. at 284.

Kansas has long recognized the principle that where the business errand is finished or abandoned and the worker sets about the pursuit of his own pleasure or indulgence, the employer is not liable for compensation.[6]

In *Walker*,[7] the Kansas Supreme Court stated:

> Where a workman is on no mission or duty for his employer, and an accident occurs to the workman while he is off the premises of the employer during the workman's lunchtime, the accident does not arise out of and in the course of the workman's employment, and compensation under the workmen's compensation act must be denied.

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[5] *Sumner v. Meier's Ready Mix, Inc.*, 282 Kan. 283, 290-91, 144 P.3d 668 (2006).

[6] *Woodring v. United Sash & Door Co.*, 152 Kan. 413, 418, 103 P.2d 837, (1940).

[7] *Walker v. Tobin Construction Co.*, 193 Kan. 701, Syl., 396 P.2d 301 (1964).

The court also stated in *Angleton*[8]: "If employment exposes the worker to an increased risk of injury of the type actually sustained, the employer is liable for compensation."

Larson's *Workers' Compensation Law*, ch. 15 (2006) states: "When the journey to or from work is made in the employer's conveyance, the journey is in the course of employment, the reason being that the risks of the employment continue throughout the journey."

Larson's *Workers' Compensation Law*, ch. 25 (2006) states:

> An employee whose work entails travel away from the employer's premises is generally considered to be within the course of his or her employment continuously during the trip, except when there is a distinct departure on a personal errand. Thus, injuries flowing from sleeping in hotels or eating in restaurants away from home are usually compensable.

The Kansas Court of Appeals, in *Messenger*,[9] stated:

> One very basic exception to the "going and coming" rule applies when the operation of a motor vehicle on the public roadways is an integral part of the employment or is inherent in the nature of the employment or is necessary to the employment, so that in his travels the employee was furthering the interests of his employer.

In *Blair*,[10] the Kansas Supreme Court stated: "Having concluded that the trip to Pittsburg to take the examination was a part of the employment, it seems entirely logical to conclude that the entire undertaking is to be considered from a unitary standpoint rather than divisible."

In *Sumner*,[11] the Kansas Supreme Court stated:

> . . . Kansas recognizes exceptions to the "going and coming" rule, one of which involves the employee's traveling upon public roadways as an integral or necessary part of the employment. [Citations omitted.] Such travel has been described as an intrinsic part of the job. Sometimes custom or usage has made travel an element

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[8] *Angleton v. Starkan, Inc.*, 250 Kan. 711, 718, 828 P.2d 933 (1992).

[9] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, Syl. ¶ 2, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

[10] *Blair v. Shaw*, 171 Kan. 524, 529, 233 P.2d 731 (1951).

[11] *Sumner*, 282 Kan. at 289.

> of the employment, and courts have held that such traveling furthers the purposes of the employer. [Citations omitted.]

The Kansas Court of Appeals has stated in *Mendoza*[12]:

> Our appellate courts have historically recognized a major exception to the going and coming rule. Where the going and coming of an employee is "actually contemplated by the employment itself," an injury occurring during the undertaking is compensable under the Workers Compensation Act. [Citation omitted.]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[14]

ANALYSIS

As in *Blair*, claimant was not on the clock and being paid when his accident occurred. But unlike *Blair* and most of the going and coming cases, claimant was not on the road traveling to or from work when his accident occurred. Rather, his truck was parked, as in *Angleton*. And like *Angleton*, claimant was responsible for the safety and protection of his truck and its contents. In this sense, claimant was on duty. Nevertheless, unlike *Angleton*, this was not the reason for claimant's injury, and it did not place claimant at a greater risk of injury.

Leaving the employer's premises to go to lunch has generally been considered analogous to traveling to and from work. Such lunch trips are, therefore, treated as falling within the going and coming rule. But claimant's job as a delivery driver meant that his route was his job, and he did not have an employment premises. Moreover, travel is inherent to claimant's employment with respondent. It is an exception to the going and coming rule when travel is an integral or necessary part of the employment. Furthermore, the manner in which claimant was required to take his lunch furthered the employer's interests. Claimant was not just permitted but was required to take the respondent's truck, keep it safe, wear the respondent's uniform, limit the break to 30 minutes, and remain within one-half mile of his route. In addition, a lunch break was required as a safety

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[12] *Mendoza v. DCS Sanitation*, 37 Kan. App. 2d 346, 349-50, 152 P.3d 1270 (2007).

[13] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[14] K.S.A. 2007 Supp. 44-555c(k).

measure. In fact, claimant had been disciplined for not taking a lunch break. Lunch breaks were not only contemplated by the employment but were required and closely controlled.

Because travel was inherent to claimant's employment and the lunch break furthered respondent's interests, claimant's accident arose out of and in the course of his employment with respondent. Claimant was neither "going and coming" nor deviating from his employment at the time of his accident.

CONCLUSION

Based upon the record presented to date, claimant has met his burden of proving that he suffered personal injury by an accident that arose out of and in the course of his employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated March 14, 2008, is reversed and remanded to the ALJ for further preliminary orders consistent herewith.

IT IS SO ORDERED.

Dated this _____ day of May, 2008.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Keith L. Mark, Attorney for Claimant
Robert J. Wonnell, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge